74 54699

(5)

57 No. 06-1431

In the
Supreme Court of the United States

CBOCS WEST, INC.,
Petitioner,

v.

HEDRICK G. HUMPHRIES,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

BRIEF FOR THE PETITIONER

Michael W. Hawkins
Counsel of Record
Michael J. Newman
DINSMORE & SHOHL LLP
Suite 1900
255 East Fifth Street
Cincinnati, OH 45202
(513) 977-8270
(513) 977-8141 fax
michael.hawkins@dinslaw.com
michael.newman@dinslaw.com

Michael Zylstra
General Counsel and
Vice President
CBOCS West, Inc.
307 Hartmann Drive
P.O. Box 787
Lebanon, TN 37088
(615) 235-4006
(615) 443-9583 fax
michael.zylstra@crackerbarrel.com

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

Is a retaliation claim cognizable under 42 U.S.C. § 1981 where an employee complains about race discrimination?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

There are no parties to the proceedings other than those listed on the caption.

Pursuant to Supreme Court Rule 29.6, Petitioner CBOCS West, Inc. makes the following disclosures: Petitioner is wholly owned by its parent, Cracker Barrel Old Country Store, Inc.; and Cracker Barrel Old Country Store, Inc. is wholly owned by its parent, CBRL Group, Inc., a publicly traded company.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF CITED AUTHORITIES vi

CITATIONS OF OFFICIAL AND UNOFFICIAL REPORTS OF OPINION AND ORDERS BY LOWER COURTS 1

JURISDICTIONAL STATEMENT 1

STATUTE INVOLVED 1

STATEMENT OF THE CASE 2

I. STATUTORY BACKGROUND 2

II. FACTUAL BACKGROUND 4

III. LOWER COURT PROCEEDINGS 5

SUMMARY OF THE ARGUMENT 7

ARGUMENT 10

I. THE PLAIN TEXT OF SECTION 1981 DOES NOT PROVIDE FOR A CAUSE OF ACTION BASED ON RETALIATION 10

II. CONGRESS INTENDED TO EXCLUDE A CAUSE OF ACTION BASED ON RETALIATION FROM SECTION 1981 WHEN IT DRAFTED AND AMENDED IT 14

A. Congress Exhibited Its Intent To Exclude A Cause Of Action Based On Retaliation From Section 1981 By Including Such Protection In Similar Anti-Discrimination Statutes, But Excluding It From Section 1981 15

B. Congress Exhibited Its Intent To Exclude Retaliation From Section 1981 Because It Knew Courts Would Only Analyze The Actual Language of Section 1981 19

C. General Statutes Like Section 1981 Do Not Subsume Detailed Statutes Like Title VII 21

III. LEGISLATIVE HISTORY CANNOT BE USED TO CREATE A CAUSE OF ACTION BASED ON RETALIATION UNDER SECTION 1981 WHEN THE STATUTE IS CLEAR 26

IV. THE SEVENTH CIRCUIT'S RELIANCE ON *SULLIVAN V. LITTLE HUNTING PARK, INC.* AND *JACKSON V. BIRMINGHAM BOARD OF EDUCATION* WAS ERRONEOUS BECAUSE THOSE CASES ARE DISTINCTLY DIFFERENT FROM THIS CASE 33

A. *Sullivan v. Little Hunting Park, Inc.* Does Not Address Section 1981, And The Court's Statutory Analysis Is Not Applicable To This Case 34

B. *Jackson v. Birmingham Board of Education* Does Not Address Section 1981, And The Court's Statutory Analysis Is Not Applicable To This Case 36

V. PUBLIC POLICY DEMANDS THAT THE COURT REVERSE THE SEVENTH CIRCUIT'S DECISION IN THIS CASE .. 39

CONCLUSION 42

TABLE OF AUTHORITIES

Page

CASES

Adams v. City of Chicago,
865 F. Supp. 445 (N.D. Ill. 1994) 28, 42

Andrews v. Lakeshore Rehab. Hosp.,
140 F.3d 1405 (11th Cir. 1998) 27, 42

Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy,
__ U.S. __, 126 S. Ct. 2455 (2006) 17, 27

Bate Refrigerating Co. v. Sulzberger,
157 U.S. 1 (1894) 8

Bedroc Limited, LLC v. United States,
541 U.S. 176 (2004) 11, 14, 35

Bulova Watch Co. v. United States,
365 U.S. 753 (1964) 21

Burlington N. & Santa Fe Ry. Co. v. White,
__ U.S. __, 126 S. Ct. 2405 (2006) ..... *passim*

Caminetti v. United States,
242 U.S. 470 (1927) 8, 11

Conn. Nat. Bank v. Germain,
503 U.S. 249 (1992) 27

Cort v. Ash,
422 U.S. 66 (1975) 20, 35

D. Ginsberg & Sons v. Popkin,
285 U.S. 204 (1932) 22

Domino's Pizza, Inc. v. McDonald,
546 U.S. 470 (2006) ..... *passim*

Emerald Investors Trust v. Gaunt Parsippany Partners,
492 F.3d 192 (3d Cir. 2007) 40

Exxon Mobil Corp. v. Allapattah Servs., Inc.,
545 U.S. 546 (2005) 26, 30, 32

Hart v. Transit Mgt. of Racine, Inc.,
426 F.3d 863 (7th Cir. 2005) 6

Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.,
530 U.S. 1 (2000) 8, 11

Hawkins v. 1115 Legal Serv. Care,
163 F.3d 684 (2d Cir. 1998) 27, 42

Jackson v. Birmingham Bd. of Educ.,
544 U.S. 167 (2005) ..... *passim*

Jones v. Bock,
__ U.S. __, 127 S. Ct. 910 (2007) 32

Jones v. R.R. Donnelley & Sons Co.,
541 U.S. 369 (2004) 25, 41

Lake County v. Rollins,
130 U.S. 662 (1889) 8

Lamie v. United States Trustee,
540 U.S. 526 (2004) 8, 11, 35

Ledbetter v. The Goodyear Tire & Rubber Co., Inc.,
__ U.S. __, 127 S. Ct. 2162 (2007) ..... *passim*

Mohasco Corp. v. Silver,
447 U.S. 807 (1980) 23

Morton v. Mancari,
417 U.S. 535 (1974) 21, 36, 38

Nat'l Ass'n of Home Builders v. Defenders of Wildlife,
__ U.S. __, 127 S. Ct. 2518 (2007) 21

Occidental Life Ins. of Cal. v. EEOC,
432 U.S. 355 (1977) 23

Patterson v. McLean Credit Union,
491 U.S. 164 (1989) ..... *passim*

Radzanower v. Touche Ross & Co.,
426 U.S. 148 (1976) 21, 25

Ratzlaf v. United States,
510 U.S. 135 (1994) 26, 27, 32

Rodriguez v. United States,
480 U.S. 522 (1987) 20, 35

Runyon v. McCarey,
427 U.S. 160 (1976) 10

Russello v. United States,
464 U.S. 16 (1983) 15, 18, 31

Sullivan v. Little Hunting Park, Inc.,
396 U.S. 229 (1969) ..... *passim*

Thomas v. Exxon, U.S.A.,
943 F. Supp. 751 (S.D. Tex. 1996),
aff'd, 122 F.3d 1067 (5th Cir. 1997) 27, 42

Townsend v. Little,
109 U.S. 504 (1883) 21

United States v. Ron Pair Enter., Inc.,
489 U.S. 235 (1989) 8, 11

United States v. Borden Co.,
308 U.S. 188 (1939) 36

United States v. Dieter,
429 U.S. 6 (1976) 40

W. Va. Univ. Hosps. v. Casey,
499 U.S. 83 (1991) 16, 17, 18, 31

Zedner v. United States,
__ U.S. __, 126 S. Ct. 1976 (2006) 30

Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.,
__ U.S. __, 127 S. Ct. 1534 (2007) 14

STATUTES AND REGULATIONS

28 U.S.C. § 1254(1) (2006) 1

28 U.S.C. § 1658 (2006) 24, 41

29 U.S.C. § 158(a)(4) (2006) 4, 17

29 U.S.C. § 215(a)(3) (2006) 4, 17

29 U.S.C. § 623(d) (2006) 4, 17

29 U.S.C. § 2615 (2006) 4, 17, 18

38 U.S.C. § 4311(b) (2006) 4, 18

42 U.S.C. § 1981 (2006) ..... *passim*

42 U.S.C. § 1981(a) (2006) 1, 2, 10

42 U.S.C. § 1981(b) (2006) ..... *passim*

42 U.S.C. § 1981a(b)(3) (2006) 24

42 U.S.C. § 1981a(c) (2006) 4

42 U.S.C. § 1982 (2006) 34, 35

42 U.S.C. § 1988 (2006) 16, 17

42 U.S.C. §§ 2000e *et seq.* (2006) 9

42 U.S.C. § 2000e-2(a) (2006) 24

42 U.S.C. § 2000e-2(k) (2006) 4

42 U.S.C. § 2000e-3(a) (2006) ..... *passim*

42 U.S.C. § 2000e-4 (2006) 3

42 U.S.C. § 2000e-5(e)(1) (2006) 3, 24, 40

42 U.S.C. § 2000e-5(f)(1) (2006) 4, 24

42 U.S.C. § 12203(a) and (b) (2006) 4, 17, 18

49 U.S.C. § 31105 (2006) 4, 18

MISCELLANEOUS

U.S. CONST. ART. I 8, 11

U.S. CONST. ART. II 8, 42

U.S. CONST. ART. III 8

Developments in the Law - Section 1981, 15 HARV. C.R.-C.L. L. REV. 29 (1980) 2

ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 17 (Princeton University Press 1998) 32

Antonin Scalia, *How Democracy Swept the World*, Wall St. J., Sept. 7, 1999, at A24 ..... 7, 42

THE FEDERALIST NO. 78, at 401-02 (Alexander Hamilton) (Phoenix Press Paperback ed. 2000) 8, 9, 11

H.R. REP. NO. 102-40, pt. 2, at 72 (1991) . 28, 30, 31

S. REP. NO. 101-315, at 45 (1990) 29, 30

BLACK'S LAW DICTIONARY 163 (7th ed. 1999) 2

THE OXFORD ENCYCLOPEDIC ENGLISH DICTIONARY, (Clarendon Press 1991) 12, 13

WEBSITES

EEOC Charge Statistics, http://www.eeoc.gov/stats/race.html (last viewed Nov. 13, 2007) 39

EEOC Charge Statistics, http://www.eeoc.gov/stats/charges.html (last viewed Nov. 13, 2007) 39

CITATIONS OF OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS AND ORDERS BY LOWER COURTS

The opinion of the United States Court of Appeals for the Seventh Circuit is published at 474 F.3d 387 (7th Cir. 2007). JA 117-166. The opinion of the United States District Court for the Northern District of Illinois concerning Petitioner's Motion for Summary Judgment is published at 392 F. Supp. 2d 1047 (N.D. Ill. 2005). JA 108-116. The opinion of the United States District Court for the Northern District of Illinois concerning Petitioner's Motion to Dismiss is published at 343 F. Supp. 2d 670 (N.D. Ill. 2004). JA 82-92.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals for the Seventh Circuit was entered on January 10, 2007. JA 117. A timely Request for Rehearing was denied on January 29, 2007. Pet. App. 1a. The Petition for Writ of *Certiorari* was filed on April 25, 2007, and was granted on September 25, 2007. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This case involves 42 U.S.C. § 1981, a part of the Civil Rights Act of 1866, and later amended in the Civil Rights Act of 1991:

> Section 1981(a) – All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make

and enforce contracts . . . as is enjoyed by white citizens . . . .

Section 1981(b) – For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

STATEMENT OF THE CASE

I. STATUTORY BACKGROUND

Passed by Congress in 1866, 42 U.S.C. § 1981 (hereinafter "Section 1981") guarantees to every person "the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens." 42 U.S.C. § 1981(a) (2006). Largely unaltered to this day, Section 1981 is an historical statute.

Shortly after the Civil War, some states enacted laws that are commonly referred to as the Black Codes. Their authors designed these laws "to restrict the liberties of the newly freed slaves to ensure a supply of inexpensive agricultural labor and to[, unfortunately,] maintain white supremacy." BLACK'S LAW DICTIONARY 163 (7th ed. 1999) (defining "Black Codes"). In a post-slavery America, some could not part with the institution of slavery, and insisted on creating a new system that would parallel the old and maintain a subordinate caste. *Developments in the Law - Section 1981*, 15 HARV. C.R.-C.L. L. REV. 29, 40 (1980). In this historical context, one could argue that

Section 1981 was intended to wipe out the Black Codes and the vestiges of slavery.

Nearly one hundred years later, America was in the midst of the Civil Rights Movement. While this movement was largely designed to promote equality among the races, it can be credited with a much broader effect. In particular, the Civil Rights Movement spawned Congress' creation of a revolutionary statutory scheme in Title VII, which, among other things, protects against: (1) discrimination based on an individual's "race, color, religion, sex, or national origin" in the employment context, 42 U.S.C. §§ 2000e-2(a)(1) and 2000e-2(a)(2); and (2) an employer's retaliation against an employee for engaging in protected activity such as "making charges, testifying, assisting, or participating in enforcement proceedings" under Title VII, 42 U.S.C. § 2000e-3(a).

In Title VII, Congress created the Equal Employment Opportunity Commission (hereinafter "EEOC") to enforce Title VII's protections against employment discrimination and retaliation. *See* 42 U.S.C. § 2000e-4 (2006). Congress also created specific requirements for filing claims against employers alleging discrimination or retaliation, namely: (1) an individual must bring a charge of discrimination before the EEOC within 180 days of the discriminatory act, 42 U.S.C. § 2000e-5(e)(1); (2) where an employee initiates a charge with a state agency, he/she must file the charge with the EEOC within 300 days of the alleged unlawful employment practice, *id.*; and (3) once the EEOC issues a right to sue letter to the aggrieved individual, he/she must file suit within 90

days or forever be barred from bringing a claim alleging employment retaliation or discrimination, *id.* at § 2000e-5(f)(1).

In 1991, Congress amended both Section 1981 and Title VII. The Civil Rights Act of 1991 specifically amended Section 1981 to include subsection (b), which defines the phrase "make and enforce contracts" to include only "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b).

The Civil Rights Act of 1991 amended Title VII by including 42 U.S.C. § 2000e-2(k) (2006), which establishes the burden of proof in disparate impact discrimination cases. Congress also created the right to a jury trial when litigating disputes under Title VII. *See* 42 U.S.C. § 1981a(c) (2006).

From 1866 to the present, not once has Congress amended Section 1981 to include a cause of action based on retaliation as it has done in numerous statutes throughout history. *Compare* 42 U.S.C. § 1981, *with* 29 U.S.C. 158(a)(4) (2006), 29 U.S.C. § 215(a)(3) (2006), 42 U.S.C. § 2000e-3(a) (2006), 29 U.S.C. § 623(d) (2006), 42 U.S.C. § 12203(a) and (b) (2006), 29 U.S.C. § 2615 (2006), 38 U.S.C. § 4311(b) (2006), *and* 49 U.S.C. § 31105 (2006).

II. FACTUAL BACKGROUND

Petitioner operates a restaurant chain known as "Cracker Barrel" in a number of states. It employed Respondent as an associate manager in one of its

restaurants. JA 82. Petitioner discharged Respondent on December 5, 2001 after another associate manager complained that Respondent left the store's safe open during the evening hours in violation of his responsibilities. JA 109.

Respondent, who is African-American, challenged his termination by filing an EEOC charge on August 9, 2002. JA 37, 55. Respondent did not check the box on his EEOC charge denoting retaliation under Title VII. JA 37, 55. On March 3, 2003, the EEOC issued a right to sue letter advising Respondent that he had 90 days in which to file a lawsuit (*i.e.*, until June 5, 2003). JA 83. Respondent, however, did not file his complaint until January 12, 2004, 221 days after June 5, 2003. JA 84, 91 (while January 12, 2004 was 221 days after June 5, 2003, the Court noted that Respondent was 195 days tardy in filing his lawsuit against Petitioner).

III. LOWER COURT PROCEEDINGS

On January 12, 2004, Respondent filed his complaint against Petitioner in the United States District Court for the Northern District of Illinois seeking relief for racial discrimination and retaliation under both Title VII and Section 1981. JA 86-87. In response to Petitioner's Motion to Dismiss, the District Court dismissed Respondent's Title VII discrimination and retaliation claims because he failed to file those claims within 90 days of receiving his right to sue letter. JA 91-92.

After the Court's decision, Respondent's only remaining claims were his Section 1981 discrimination and retaliation claims. JA 109-110. Following

discovery, Petitioner filed a Motion for Summary Judgment. JA 108. In response to the motion, Respondent abandoned his Section 1981 discrimination claim. JA 115 (noting that it became "apparent from the presentation [Respondent made] in his opposition papers" that Respondent's retaliation claim was the only claim that had "any vitality"). The District Court granted Petitioner's Motion, holding that Respondent could not establish a *prima facie* case of retaliation. JA 113-116.

Respondent then appealed his case to the Seventh Circuit Court of Appeals with respect to his Section 1981 claims. JA 117-118. In opposition, Petitioner argued, *inter alia*, the following: (1) a new decision from the Seventh Circuit precluded Respondent from even bringing a retaliation claim under Section 1981, *see Hart v. Transit Mgt. of Racine, Inc.*, 426 F.3d 863 (7th Cir. 2005); and (2) assuming that Respondent had a viable Section 1981 retaliation claim, he could not establish a *prima facie* case of retaliation against Petitioner. *See* JA 117-166 *generally*.

On appeal, the Seventh Circuit overruled its decision in *Hart* and ruled in favor of Respondent. JA 146, 149 n. 12. It held that Section 1981 provides for a cause of action based on retaliation:

> [T]he issue before us is whether section 1981, as amended by the Civil Rights Act of 1991, applies to claims of retaliation. We hold that it does. The plain text of the statute, as amended in 1991, makes clear that section 1981 encompasses the "termination of contracts," and there can be no doubt that a retaliatory

> discharge is indeed a termination of the employment contract. . . . [T]he legislative history confirms that Congress intended retaliation to be included within section 1981.

JA 137-138. Of particular import, the Seventh Circuit disclaimed its duty to "harmonize" Section 1981 and Title VII, despite the statutes' partial overlap. JA 145.

SUMMARY OF ARGUMENT

One of the lasting principles of the American Revolution is the idea that "laws should be made not by a ruler, or his ministers, or his appointed judges, but by representatives of the people." Antonin Scalia, Editorial, *How Democracy Swept the World*, WALL ST. J., Sept. 7, 1999, at A24. Indeed, this principle has become accepted all over the world, even in countries where the principle is not actually practiced. *Id.* This case is of paramount importance for the protection of this principle in the United States. This case is not about taking a remedy away from Respondent or anyone else who is retaliated against for complaining about racial discrimination in the workplace. That remedy already exists in Title VII of the Civil Rights Act of 1964. This case is about respect for and proper construction of the laws Congress, as the elected representatives of the people, enacts.

The sole legal issue presented in this case is whether a retaliation claim is cognizable under 42 U.S.C. § 1981. This Court should reverse the Seventh Circuit Court of Appeals and hold that Section 1981 does not recognize a cause of action based on retaliation because: (1) the plain language of Section

1981 does not provide for a cause of action based on retaliation; (2) proper application of statutory construction shows that Congress intended to exclude retaliation from Section 1981; (3) the Seventh Circuit misused legislative history to create a cause of action under Section 1981 where none exists in the text of the statute; (4) the Seventh Circuit erroneously relied on this Court's decisions in *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969), and *Jackson v. Birmingham Board of Education*, 544 U.S. 167 (2005), to support its decision; and (5) public policy demands reversal.

Absent any textual support, the Seventh Circuit improperly created a cause of action based on retaliation under Section 1981. This unauthorized creation poses a danger to the long-standing jurisprudence of this Court, holding that when a statute's language is plain, the only function of any court is to enforce the statute according to its terms. *Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004); *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000); *United States v. Ron Pair Enter., Inc.*, 489 U.S. 235, 241 (1989); *Caminetti v. United States*, 242 U.S. 470, 485 (1927); *Bate Refrigerating Co. v. Sulzberger*, 157 U.S. 1, 33 (1894); *Lake County v. Rollins*, 130 U.S. 662, 670 (1889).

By creating a cause of action for retaliation under Section 1981, the Seventh Circuit has, in effect, drafted, passed, and executed legislation without concern for the democratic norms embodied in the Constitution, particularly the separation of powers. *See* U.S. CONST. ARTS. I, II, & III. *See also* THE

FEDERALIST NO. 78, at 401-02 (Alexander Hamilton) (Phoenix Press Paperback ed., 2000) ("It can be of no weight to say that the courts, on the pretense of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature. . . . The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body.") (capitalization in original).

The Seventh Circuit ignored the plain language of Section 1981 and Congress' intentional exclusion of a cause of action based on retaliation in Section 1981. Historically, when Congress has wished to create such a cause of action in an anti-discrimination statute, it has explicitly done so. Congress did not include an anti-retaliation provision in Section 1981, and courts are not free to create rights and remedies beyond those set forth in the text that Congress has chosen to enact.

The Seventh Circuit's decision threatens to eviscerate the administrative and procedural safeguards of Title VII that Congress specifically enacted to govern claims of race discrimination and retaliation in the employment context. *See* 42 U.S.C. § 2000e, *et seq*, ("Title VII"). This, by itself, tips the scales in favor of Petitioner's position.

Finally, the Seventh Circuit's decisions to (1) improperly infer a cause of action based on retaliation from the legislative history alone, (2) erroneously rely on the Court's opinions in *Sullivan* and *Jackson*, and (3) ignore proper public policy concerns support Petitioner's argument.

For these reasons, the Court should reverse the Seventh Circuit's decision and hold that Section 1981 does not provide for a cause of action based on retaliation.

ARGUMENT

I. THE PLAIN TEXT OF SECTION 1981 DOES NOT PROVIDE FOR A CAUSE OF ACTION BASED ON RETALIATION.

The text of Section 1981, like all other statutes, only protects specific rights. At its core, Section 1981 "protects the equal right of 'all persons . . . to make and enforce contracts' without respect to race." *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 474 (2006) (quoting 42 U.S.C. § 1981(a)). In the Civil Rights Act of 1991, Congress defined the phrase "make and enforce" to include "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b). Even though amended, an employer's conduct is not actionable under Section 1981's text unless it is "racially motivated." *Runyon v. McCarey*, 427 U.S. 160, 168 (1976). Courts cannot disregard Congress' express language and create a cause of action based on retaliation where none exists in the statute. The fact of the matter is that the plain language of Section 1981 does not contain the word "retaliation" or any wording that one could legitimately construe as an anti-retaliation clause. *See, e.g.*, 42 U.S.C. § 2000e-3(a) (the congressionally created anti-retaliation clause in Title VII).

It is well established that "when [a] statute's language is plain, the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms." *Hartford Underwriters*, 530 U.S. at 6; *Ron Pair Enter.*, 489 U.S. at 241; *Caminetti*, 242 U.S. at 485. *See also Burlington N. & Santa Fe Ry. Co. v. White*, __ U.S. __, 126 S. Ct. 2405, 2412 (2006) (analyzing Title VII and noting that "Congress acts intentionally and purposely in the disparate inclusion or exclusion" of certain words and phrases in statutes) (Breyer, J.) (internal citation omitted); *Lamie*, 540 U.S. at 542 ("If Congress enacted into law something different from what it intended, then [Congress] should amend the statute to conform it to its intent.") (Kennedy, J.); *Bedroc Limited, LLC v. United States*, 541 U.S. 176, 183 (2004) ("The preeminent canon of statutory interpretation requires [the Court] to 'presume that the legislature says in a statute what it means and means in a statute what it says.'"). *See also* THE FEDERALIST NO. 78, *supra*, at 401-02. The Founding Fathers invested the legislative power of the United States Government in Congress alone. U.S. CONST. ART. I, § 1. They did not give the judiciary the power to unilaterally create laws or draft statutory language where Congress declined to do so. The judiciary must respect the statutory language Congress enacts.

Indeed, this Court has, in the past, respected and relied on the plain language of Section 1981 when analyzing its text. *See Domino's Pizza*, 546 U.S. at 479-80 (holding that commensurate with the "plain text of the statute," an individual "cannot state a claim under § 1981 unless he has (or would have) rights under the existing (or proposed) contract that he

wishes 'to make and enforce'") (Scalia, J.); *Patterson v. McLean Credit Union*, 491 U.S. 164, 176 (1989) (applying a textualist analysis to Section 1981 and limiting Section 1981 to its text) (Kennedy, J.).

Section 1981's plain language is clear. Congress never used the word "retaliation" or a derivative thereof in its text. Nor did Congress articulate in any way that a party can bring a cause of action under Section 1981 based on retaliation as it did in Title VII. *Compare* 42 U.S.C. § 1981, *with* 42 U.S.C. § 2000e-3(a). In fact, not one word in Section 1981 can be interpreted as including retaliation. *See* THE OXFORD ENCYCLOPEDIC ENGLISH DICTIONARY 1377 (Clarendon Press 1991) (defining "termination" to mean "the act of terminating. . . . an end or extremity; close or conclusion. . . . an ending of employment with a specific employer"); *id.* at 320 (defining "make" to mean "to draw up; draft. . . . to agree upon [or] arrange"); *id.* at 442 (defining "enforce" to mean "to put or keep in force; compel obedience to"); *id.* at 127 (defining "benefit" to mean "something that is advantageous or good"); *id.* at 1074 (defining "privilege" to mean "a right, immunity, or benefit enjoyed by a particular person or a restricted group of persons. . . . any of the rights common to all citizens under a modern constitutional government"). *Cf. id.* at 1233 (defining "retaliate" to mean "repay an injury, insult, etc., in kind; attack in return; make reprisals").

There is a distinct difference between denying an individual the equal right to "make and enforce contracts" without respect to his/her race, and retaliating against that same person because he/she complained about discrimination. *See Burlington N.*,

126 S. Ct. at 2412 (noting a distinction between discrimination and retaliation in Title VII – "[t]he substantive provision [addressing race] seeks to prevent injury to individuals based on who they are, *i.e.*, their status. The anti-retaliation provision seeks to prevent harm to individuals based on what they do, *i.e.*, their conduct.") (Breyer, J.); *Jackson*, 544 U.S. at 185 ("[a] claim of retaliation is not a claim of discrimination on the basis of [race]") (Thomas, J., dissenting). The common meaning of the words "discriminate" and "retaliate" demonstrates the distinction. *Compare* THE OXFORD ENCYCLOPEDIC ENGLISH DICTIONARY 411 (Clarendon Press 1991) (defining "discriminate" to mean "make a distinction, esp. unjustly and on the basis of race, colour, or sex"), *with id.* at 1233 (defining "retaliate" to mean "repay an injury, insult, etc., in kind; attack in return; make reprisals").

Disregarding these principles, the Seventh Circuit held that "[t]he plain text of the statute, as amended in 1991, makes clear that section 1981 encompasses the 'termination of contracts,' and there can be no doubt that a retaliatory discharge is indeed a termination of the employment contract." JA 137. The Seventh Circuit, however, ignored the fact that to be actionable under Section 1981, the plain language of the statute requires that a termination of a contractual relationship occur in such a way as to deny an individual rights that are otherwise enjoyed by white citizens, or because of that individual's race – not just a termination in the abstract. *See Domino's Pizza*, 546 U.S. at 474 (holding that Section 1981 "protects the equal right of 'all persons . . . to make and enforce contracts' without respect to race").

In this case, Respondent bases his claim under Section 1981 on Petitioner's alleged response to his conduct (*i.e.*, the fact that he complained about racial discrimination), not his status (*i.e.*, the fact that he is African-American). Congress, however, only provided protection under Section 1981 based on an individual's status (*i.e.*, race/color). *See* 42 U.S.C. § 1981. *See also Domino's Pizza*, 546 U.S. at 474 (holding that Section 1981 "protects the equal right of 'all persons . . . to make and enforce contracts' without respect to race"). By contrast, in Title VII, Congress explicitly created a cause of action when an employer retaliates against an employee who engaged in clearly defined protected activity. *See, e.g.*, 42 U.S.C. § 2000e-3(a).

This Court should reverse the Seventh Circuit's decision in this case because Section 1981's plain language does not provide for a cause of action based on retaliation.

II. CONGRESS INTENDED TO EXCLUDE A CAUSE OF ACTION BASED ON RETALIATION FROM SECTION 1981 WHEN IT DRAFTED AND AMENDED IT.

The text of Section 1981 is clear, and further analysis is unnecessary. *See Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, __ U.S. __, 127 S. Ct. 1534, 1543 (2007) ("[I]f the intent of Congress is clear and unambiguously expressed by the statutory language at issue, that would be the end of our analysis."); *Bedroc Limited*, 541 U.S. at 183 ("The preeminent canon of statutory interpretation requires [the Court] to 'presume that the legislature says in a statute what it means and means in a statute what it says.'").

Nonetheless, several well-established principles of statutory construction additionally illustrate Congress' intent to exclude a cause of action based on retaliation from Section 1981: (1) Congress has historically included specific anti-retaliation clauses in anti-discrimination statutes, but it purposely did not include such a clause when it amended Section 1981 in 1991; (2) when Congress amended Section 1981, Congress knew that courts would analyze Section 1981 based on its plain text and not read an anti-retaliation clause into that text; and (3) Congress does not intend general statutes like Section 1981 to subsume specific statutes like Title VII.

A. Congress Exhibited Its Intent To Exclude A Cause Of Action Based On Retaliation From Section 1981 By Including Such Protection In Similar Anti-Discrimination Statutes, But Excluding It From Section 1981.

Before and after it passed the Civil Rights Act of 1991, Congress expressed its intent to include specific anti-retaliation clauses in statutes where it intended to provide for such a cause of action. In 1991, however, Congress specifically chose to exclude an anti-retaliation provision from Section 1981.

This Court has held that where "Congress acts intentionally and purposely in the disparate inclusion or exclusion" of certain clauses in statutes, it is not the role of the Court to intrude upon that deliberate decision. *Russello v. United States*, 464 U.S. 16, 23 (1983). *See also Burlington N.*, 126 S. Ct. at 2412 (analyzing Title VII and citing the same principle of

law) (Breyer, J.). This principle applies where the Court looks at internal statutory conflicts, as well as situations, like the present, where Congress has specifically excluded a statutory provision from one statute that it often times includes in similar statutes. *See W. Va. Univ. Hosps. v. Casey*, 499 U.S. 83 (1991).

In *Casey*, 499 U.S. at 84, the Court addressed the issue of whether expert witness fees shift to the losing party in civil rights litigation "pursuant to 42 U.S.C. § 1988, which permits the award of 'a reasonable attorney's fee.'" The Court undertook an extensive statutory analysis, which led to the following:

> The record of statutory usage demonstrates convincingly that attorney's fees and expert fees are regarded as separate elements of litigation cost. While some fee-shifting provisions, like § 1988, refer only to "attorney's fees," *see, e.g.*, Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k), many others explicitly shift expert witness fees *as well as* attorney's fees. . . .
>
> . . . At least 34 statutes in 10 different titles of the U.S. Code explicitly shift attorney's fees and expert witness fees . . . .
>
> * * *
>
> We think this statutory usage shows beyond question that attorney's fees and expert fees are distinct items of expense. If, as [Petitioner] argues, the one includes the other, dozens of

> statutes referring to the two separately become an inexplicable exercise in redundancy.

Id. at 88-92.[1]

Despite this Court's direction in *Casey*, when the Seventh Circuit held in this case that Congress intended Section 1981 to encompass retaliation, it effectively held that Congress infused numerous anti-discrimination statutes with superfluous anti-retaliation provisions.

Both before and after the 1991 amendments to Section 1981, where Congress decides to protect against retaliation, Congress has consistently inserted anti-retaliation clauses into anti-discrimination laws and other statutes. *See, e.g.*, 29 U.S.C. 158(a)(4) (anti-retaliation provision in National Labor Relations Act, enacted in 1935 and amended to include anti-retaliation clause in 1947); 29 U.S.C. § 215(a)(3) (anti-retaliation provision in Fair Labor Standards Act, enacted in 1938); 42 U.S.C. § 2000e-3(a) (anti-retaliation provision in Title VII, enacted in 1964); 29 U.S.C. § 623(d) (anti-retaliation provision in Age Discrimination in Employment Act, enacted in 1967); 42 U.S.C. § 12203(a) and (b) (anti-retaliation provision in Americans with Disabilities Act, enacted in 1990); 29 U.S.C. § 2615 (anti-retaliation provision in Family

---

[1] While Congress later amended the text of 42 U.S.C. § 1988 to allow recovery for both attorney's fees and expert fees, *see* 42 U.S.C. § 1988(c) (2006), the analytical framework of *West Virginia University Hospitals v. Casey*, 499 U.S. 83 (1991), is still authoritative. *See Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, __ U.S. __, 126 S. Ct. 2455 (2006).

and Medical Leave Act, enacted in 1993); 38 U.S.C. § 4311(b) (anti-retaliation provision in Uniformed Services Employment and Reemployment Act, enacted in 1994); 49 U.S.C. § 31105 (anti-retaliation provision in Surface Transportation Assistance Act of 1982, amended in 1994 to protect against retaliation).

Of particular importance, in 1990, just one year prior to the Civil Rights Act of 1991, Congress chose to include an anti-retaliation clause in the Americans with Disabilities Act. *See* 42 U.S.C. § 12203(a) and (b). And, in 1993, just two years after the Civil Rights Act of 1991, Congress chose to use a similar anti-retaliation clause in the Family and Medical Leave Act. *See* 29 U.S.C. § 2615. But, in drafting and implementing amendments to Section 1981 in the Civil Rights Act of 1991, Congress specifically excluded such a provision.

By concluding that Congress intended to protect against retaliation in Section 1981, the Seventh Circuit made Congress' decisions to enact anti-retaliation clauses in many other federal statutes superfluous. Such a result is contrary to this Court's previous holdings that "Congress acts intentionally and purposely in the disparate inclusion or exclusion" of particular statutory provisions. *See Russello*, 464 U.S. at 23; *Burlington N.*, 126 S. Ct. at 2412; *Casey*, 499 U.S. at 88-92.

Accordingly, this Court should reverse the Seventh Circuit on the grounds that Congress specifically decided not to recognize a cause of action based on retaliation under Section 1981.

B. Congress Exhibited Its Intent To Exclude Retaliation From Section 1981 Because It Knew Courts Would Only Analyze The Actual Language Of Section 1981.

When Congress drafted the Civil Rights Act of 1991, amending Section 1981, Congress was operating under the assumption that the judiciary would analyze Section 1981 based on its text. Thus, if Congress intended Section 1981 to provide for a cause of action based on retaliation, it would have provided for such a remedy in the statutory text of Section 1981.

In 1989, this Court decided *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) (Kennedy, J.), in which it addressed the issue of whether a racial harassment claim exists under Section 1981. The Court answered this question in the negative, holding that Section 1981 protects only what the text says it protects, namely the right to make and enforce contracts. *Id.* at 176. The Court found that the first right (*i.e.*, the right to make contracts) "does not extend, as a matter of either logic or semantics, to conduct by the employer after the contractual relationship has been established, including breach of the terms of the contract or imposition of discriminatory working conditions." *Id.* at 177. The Court found that the second right (*i.e.*, the right to enforce contracts) was also narrowly and literally construed only to "prohibit[] discrimination that infects the legal process in ways that prevent one from enforcing contract rights." *Id.* Accordingly, the Court analyzed Section 1981 based on its text, which only protects an individual's equal right "to 'make and

enforce contracts' without respect to race." *See Domino's Pizza*, 546 U.S. at 474.

Two years later, in 1991, Congress amended Section 1981, the very statute at issue in *Patterson*. At that point in time, the Court had made abundantly clear to Congress that it would look to the specific statutory language when interpreting statutes. Beginning with *Cort v. Ash*, 422 U.S. 66 (1975), and continuing through *Rodriguez v. United States*, 480 U.S. 522 (1987), and ultimately *Patterson*, the Court made explicitly clear that it would not independently search out Congress' subjective intent where the statute did not require such an effort. *See* JA 163-164 (Easterbrook, J., dissenting) (noting that in 1975, the Court began "lash[ing] [statutory] interpretations more closely to the statutory text"). Congress was aware of the Court's analytical framework in 1991 and would have specifically provided for a cause of action based on retaliation under Section 1981, if it truly intended to afford individuals such relief under Section 1981.

Since the text of Section 1981 clearly does not provide for a cause of action based on retaliation, the Seventh Circuit focused its opinion on a portion of the legislative history and the alleged necessity for such a cause of action under Section 1981. JA 138-145 (addressing *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005) and legislative history). In doing so, the Seventh Circuit erroneously engaged in statutory interpretations well beyond the statutory text of Section 1981, and contrary to this Court's established statutory analysis.

Accordingly, this Court should reverse the Seventh Circuit's decision because it ignored the Court's analytical framework concerning statutes and Congress' intent to exclude a cause of action based on retaliation from Section 1981.

C. General Statutes Like Section 1981 Do Not Subsume Detailed Statutes Like Title VII.[2]

It is axiomatic that "a specific statute controls over a general one 'without regard to priority of enactment.'" *Bulova Watch Co. v. United States*, 365 U.S. 753, 758 (1964) (quoting *Townsend v. Little*, 109 U.S. 504, 512 (1883)). *See also Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, __ U.S. __, 127 S. Ct. 2518, 2532 (2007) ("a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum"); *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976) ("when the mind of the legislator has been turned to the details of a subject, and he has acted upon it, a subsequent statute in general terms, or treating the subject in a general manner, and not expressly contradicting the original act, shall not be considered as intended to affect the more particular or positive previous provisions . . .") (internal citation omitted); *Morton v. Mancari* 417 U.S. 535, 550-51 (1974) (holding that a specific statute is not to be

---

[2] While it could be argued that Section 1981 should not apply in the employment context due to Congress' specific enactment of Title VII and its application to employment discrimination and retaliation, for purposes of this brief, Petitioner only addresses whether a retaliation claim exists under Section 1981.

"controlled or nullified" by a general statute); *D. Ginsberg & Sons v. Popkin*, 285 U.S. 204, 208 (1932) (noting that "[s]pecific terms prevail over the general in the same or another statute which otherwise might be controlling"). With respect to Section 1981 and Title VII, this Court has even stated that because "egregious racial harassment of employees is forbidden by a clearly applicable law (Title VII)," courts should be loath "to twist the interpretation of another statute (§ 1981) to cover the same conduct." *Patterson*, 491 U.S. at 181.

In *Patterson*, the Court decided that if it were to interpret Section 1981 too broadly, it would "undermine the detailed and well-crafted procedures for conciliation and resolution of Title VII claims." *Patterson*, 491 U.S. at 180.[3] The Court realized that "[i]n Title VII, Congress set up an elaborate administrative procedure, implemented through the EEOC, that is designed to assist in the investigation of claims of racial discrimination in the workplace and to work towards the resolution of these claims through conciliation rather than litigation." *Id.* It found that "Section 1981, by contrast, provides no administrative review or opportunity for conciliation." *Id.* The existence of Title VII nullifies any argument that Section 1981 should be read to include retaliation, at

---

[3] While *Patterson*'s holding that post-formation conduct is not actionable under Section 1981 is no longer in effect due to the subsequent enactment of 42 U.S.C. § 1981(b), the remainder of the Court's decision in *Patterson* provides an appropriate basis for determining the correct legal and analytical approach to Section 1981's interaction with Title VII.

least in the employment context, because Title VII already provides for that protection.

In May of 2007, this Court again asserted that "it is not [the Court's] prerogative to change the way in which Title VII balances the interests of aggrieved employees against the interest in encouraging the 'prompt processing of all charges of employment discrimination' and the interest in repose." *Ledbetter v. The Goodyear Tire & Rubber Co., Inc.*, __ U.S. __, 127 S. Ct. 2162, 2177 (2007) (quoting *Mohasco Corp. v. Silver*, 447 U.S. 807, 825 (1980)). *Ledbetter* presented the Court with the opportunity to judicially extend one of Title VII's filing deadlines, but the Court stated that it "must 'give effect to the statute as enacted'" in order to avoid usurping Congress' legislative authority. *Id.* at 2170 (internal citation omitted). The Court refused, as it has repeatedly, to "extend or truncate Congress' deadlines." *Id.* It held that Title VII's "short deadline[s] reflect[] Congress' strong preference for the prompt resolution of employment discrimination allegations through voluntary conciliation and cooperation." *Id.* at 2170-71 (citing *Occidental Life Ins. of Cal. v. EEOC*, 432 U.S. 355, 367-68 (1977)). In *Ledbetter*, the Court reinforced the importance of Title VII's administrative and procedural mechanisms concerning employment discrimination and retaliation, which were clearly articulated by Congress.

As in *Patterson*, this Court is now presented with the following two statutes: (1) Title VII, specifically addressing discrimination and retaliation in the employment context; and (2) Section 1981, addressing the equal right to make and enforce contracts regardless of an individual's race.

Title VII's specific provisions protect against unlawful employment practices, which include: (1) discriminating against an individual in the employment relationship "because of such individual's race, color, religion, sex, or national origin," 42 U.S.C. §§ 2000e-2(a)(1) and 42 U.S.C. § 2000e-2(a)(2); and (2) retaliating against an employee for engaging in protected conduct such as "making charges, testifying, assisting, or participating in enforcement proceedings" under Title VII, 42 U.S.C. § 2000e-3(a).

Title VII further requires that an individual bring a charge of discrimination before the EEOC within 180 days of the discriminatory act. 42 U.S.C. § 2000e-5(e)(1). Where an employee initiates a charge with a state agency, he/she must file the charge with the EEOC within 300 days of the alleged unlawful employment practice. *Id.* Once the EEOC issues a right to sue letter to the aggrieved individual, he/she must file suit within 90 days or forever be barred from bringing a claim alleging employment retaliation or discrimination. *Id.* at § 2000e-5(f)(1). Another unique aspect of Title VII is that Congress chose to cap compensatory and punitive damages available to plaintiffs in employment discrimination and retaliation cases. *See* 42 U.S.C. § 1981a(b)(3) (2006).

In comparison, Section 1981, as enacted in 1866 and later amended in 1991, protects the equal right to make and enforce contracts without respect to race. Section 1981 lacks all of the administrative and procedural mechanisms present in Title VII. While Congress did not specifically articulate a statute of limitations in Section 1981, the Court has held that 28 U.S.C. § 1658 creates a four-year statute of limitations

for Section 1981. *Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 372 (2004). Furthermore, Congress chose not to limit compensatory and punitive damages under Section 1981.

Per this Court's previous holdings, absent explicit intent, Congress could not have intended to destroy Title VII's specific administrative and procedural mechanisms governing discrimination and retaliation in the employment relationship when it amended Section 1981 in 1991. *See Radzanower*, 426 U.S. at 153. *See also Ledbetter*, 127 S. Ct. at 2170-71 (noting the importance of Title VII's statutes of limitations). The extra delay in resolution of disputes under Section 1981 as compared to Title VII – upwards of four years based on *R.R. Donnelley & Sons* – will add significant costs and delay to litigation of employment claims, contrary to the intent of Congress set forth in Title VII.

The practical effect of the Seventh Circuit's decision in the case at bar is that Section 1981 will provide an identical cause of action to Title VII, but without any of the congressionally-mandated procedural and administrative requirements of Title VII. As the District Court properly found, Respondent failed to file his case in a timely manner after he received a right to sue letter from the EEOC. JA 91-92. Yet, if this Court affirms the Seventh Circuit's decision, Respondent's non-compliance with Title VII's congressionally-mandated statutes of limitations is irrelevant because he, and any other employee similarly situated, can still bring a cause of action for retaliation against his employer under Section 1981. If this Court does not reverse the Seventh Circuit and hold that a cause of action based on retaliation does not exist under

Section 1981, it will be implying that the congressionally-created statutes of limitations in Title VII are irrelevant in employment discrimination and retaliation cases related to race, directly contradicting this Court's holding in *Ledbetter*. *See generally Ledbetter*, 127 S. Ct. 2162.

As Judge Easterbrook wrote in dissent below, Respondent "is not the first . . . disgruntled employee [who] turned to § 1981 after missing the deadline for litigation under Title VII." JA 160. If the Court affirms the Seventh Circuit's decision, he will certainly not be the last to do so.

Accordingly, because Congress drafted Title VII and created the EEOC to address retaliation claims in the employment context, the general language of Section 1981 cannot be read to obliterate Title VII's procedural and administrative safeguards. The Court should therefore reverse the Seventh Circuit's decision in this case.

III. LEGISLATIVE HISTORY CANNOT BE USED TO CREATE A CAUSE OF ACTION BASED ON RETALIATION UNDER SECTION 1981 WHEN THE STATUTE IS CLEAR.

This Court has long held that where the statutory language is plain, resorting to legislative history is unnecessary. *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) (Kennedy, J.) ("The authoritative statement is the statutory text, not the legislative history or any other extrinsic material."); *Ratzlaf v. United States*, 510 U.S. 135, 147 (1994) ("we do not resort to legislative history to cloud a statutory

text that is clear"). *See also Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, __ U.S. __, 126 S. Ct. 2455, 2463 (2006). This Court has "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat. Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (citations and internal quotations omitted) (Thomas, J.). The text is preferred over legislative history because the latter is unreliable and often misleading.

Despite the plain language of Section 1981 and principles of statutory construction showing that it does not provide for a cause of action based on retaliation, the Seventh Circuit heavily relied on part of the legislative history surrounding the Civil Rights Act of 1991 to support its conclusion that such a cause of action must be read into the statute. *See* JA 138 (noting that "the legislative history confirms that Congress intended retaliation to be included within Section 1981"). Many other courts have made similar assertions in error. *See, e.g., Hawkins v. 1115 Legal Serv. Care*, 163 F.3d 684, 693 (2d Cir. 1998) (recognizing a claim under Section 1981 because "[l]egislative history supports the view that this definition was intended to encompass both a race-based failure to promote and retaliation for a complaint of such a failure to promote"); *Andrews v. Lakeshore Rehab. Hosp.*, 140 F.3d 1405, 1411, n. 12 (11th Cir. 1998) (citing lower court opinions and legislative history in support of a claim of retaliation under Section 1981); *Thomas v. Exxon, U.S.A.*, 943 F. Supp. 751, 762 (S.D. Tex. 1996) *aff'd*, 122 F.3d 1067 (5th Cir. 1997) (citing legislative history in support of recognizing a claim of retaliation under Section 1981);

Adams v. City of Chicago, 865 F. Supp. 445, 446 (N.D. Ill. 1994) (recognizing a claim of retaliation under Section 1981 because "[t]he legislative history makes Congress' intent clear . . .").

The legislative history that purportedly evinces Congress' intent consists of a single excerpt from a House Committee Report. That excerpt provides that "[t]he Committee intends this provision [42 U.S.C. § 1981(b)] to bar all race discrimination in contractual relations . . .[, which] would include but not be limited to, claims of harassment, discharge, demotion, promotion, transfer, retaliation, and hiring." H.R. REP. NO. 102-40, pt. 2, at 72 (1991).[4]

---

[4] The alleged types of "race discrimination" listed in the legislative history do not relate to one another. In particular, "retaliation" does not relate to the other terms. "Retaliation" describes the motive behind an action, whereas "harassment," "discharge," "demotion," "promotion," "transfer," and "hiring" are specific employment actions. When Congress protects against retaliation, as it did in Title VII, it does so by describing the activities for which an employee receives protection. *See, e.g.*, 42 U.S.C. § 2000e-3(a). "Retaliation" standing alone does not mean anything in the employment context because to be liable for retaliation, there must be a defined protected activity against which an employer retaliates. Congress has not defined such activities in the context of Section 1981. Accordingly, an employer cannot be held liable under Section 1981 for retaliation. Additionally, employees already receive protection, under Title

In related legislative history, the Senate Committee on Labor and Human Resources prepared a report in 1990 addressing an identical amendment to that adopted by the full Congress in 1991 and codified at 42 U.S.C. § 1981(b). Therein, the Committee stated:

> The Act would overrule *Patterson* by adding at the conclusion of section 1981 a new subsection (b) that would make it clear that the right to "make and enforce contracts" free from race discrimination protected by Section 1981 includes "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship." The Committee intends this provision to bar all race discrimination in contracts. The list set forth in the subsection (b) added by the Act is intended to be illustrative rather than exhaustive.

S. REP. NO. 101-315, at 45 (1990). Nowhere did the Senate Committee mention retaliation like the House Committee.

Thus, legislative history can lead jurists to mistakenly believe "that what is said by a single person in a floor debate or by a committee report represents the view of Congress as a whole – so that we sometimes even will say (when referring to a floor statement and committee report) that 'Congress has

---

VII, against each thing listed in this legislative history. *See supra* Section II(C).

expressed' thus-and-so." *Zedner v. United States*, __ U.S. __, 126 S. Ct. 1976, 1991 (2006) (Scalia, J., concurring). Legislative history provides courts the opportunity to add language to a statute that a majority of the legislature did not approve, while at the same time hiding behind assertions that "Congress" actually approved a statement when only a committee approved the statement, not Congress.

In the case of Section 1981(b), the House Committee Report is not even in accord with a Senate Committee Report addressing the same statutory language. *Compare* H.R. REP. NO. 102-40, pt. 2, at 72 (1991), *with* S. REP. NO. 101-315, at 45 (1990). The full Congress cannot be said to have adopted either of these Reports in place of the specific language used in the actual statute. This is exactly why the statutory language is controlling.

Striking an even deeper blow to democratic values and the constitutional separation of powers, reliance on legislative history gives "unelected staffers and lobbyists . . . both the power and the incentive to attempt strategic manipulations of legislative history to secure results that they were unable to achieve through the statutory text." *Exxon Mobil*, 545 U.S. at 568 (also noting that "investigation of legislative history has a tendency to become . . . an exercise in looking over a crowd and picking out your friends") (internal quotations omitted). Put simply, the use of legislative history enables unelected individuals the opportunity to alter legislation behind the scenes without presenting their proposals to Congress as a whole.

There is no better illustration of this problem than this case. As explained in Section II(A) above, this Court holds that where "Congress acts intentionally and purposely in the disparate inclusion or exclusion" of certain clauses in statutes, it is not the role of the Court to intrude upon that deliberate decision. *Russello*, 464 U.S. at 23. *See also Burlington N.*, 126 S. Ct. at 2412 (analyzing Title VII and citing the same principle of law) (Breyer, J.); *Casey*, 499 U.S. at 88-92. Here, a legislator, staffer, lobbyist, or group thereof was apparently successful in having a House Committee Report mention that it was the intent of the House Committee for Section 1981(b)'s definition of "make and enforce contracts" to provide protection against retaliation in the employment context. *See* H.R. REP. NO. 102-40, pt. 2, at 72 (1991). However, he, she, or they never convinced a majority of Congress to amend Section 1981 to include a separate cause of action for retaliation or any other employment circumstance as it did in Title VII. These non-legislative expressions have now been used by courts like the Seventh Circuit to create a new cause of action that Congress never voted to enact.

Use of legislative history, especially where used to create a cause of action, is dangerous. Laws are rules adopted by elected officials that the body politic has agreed will govern the behavior of its members. The body politic can only operate in conformity with those rules if it knows what those rules are. The body politic cannot be expected to guess what Congress "intends" a law to mean by analyzing floor debates, committee reports, and all minutiae of legislative history. Members of the body politic must be able to look at a statute and decipher how they should act based on

what the statute says. Similarly, they should be aware of the consequences for violating any given statute. Where a particular statute does not provide for a cause of action based on retaliation, an employer cannot be held liable under that particular statute for retaliation. Laws/rules should not require the body politic to continually guess what its members can and cannot do simply because one individual put one line in a committee report that was not adopted by Congress. Employers and the public are entitled to predictability, clarity, and fair notice of any penalty a particular statute may impose. By placing such an onerous burden on citizens (requiring them to analyze all non-statutory minutiae reduced to writing by the Congress), it could be said that the Seventh Circuit acted like Emperor Nero, who is said to have posted his edicts high up on pillars so individuals could not easily read them. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 17 (Princeton University Press 1998) (noting Emperor Nero's practices).

The text thus retains primacy when interpreting federal statutes. Legislative history should not and cannot be consulted in the face of a clear and unambiguous text. *Ratzlaf*, 510 U.S. at 147. *See also Jones v. Bock*, __ U.S. __, 127 S. Ct. 910, 921 (2007) ("Whatever temptations the statesmanship of policymaking might suggest, the judge's job is to construe the statute – not make it better."); *Exxon Mobil*, 545 U.S. at 568 ("The authoritative statement is the statutory text, not the legislative history or any other extrinsic material."). Section 1981 is no exception. *See Domino's Pizza*, 126 S. Ct. 1246

(interpreting Section 1981 from a textualist perspective).[5]

The Seventh Circuit ignored these basic tenets of Supreme Court jurisprudence and decided to fashion a remedy for retaliation under Section 1981 based on a select piece of legislative history, not based on Section 1981's actual text. Accordingly, this Court should reverse the Seventh Circuit's decision.

IV. THE SEVENTH CIRCUIT'S RELIANCE ON *SULLIVAN V. LITTLE HUNTING PARK, INC.* AND *JACKSON V. BIRMINGHAM BOARD OF EDUCATION* WAS ERRONEOUS BECAUSE THOSE CASES ARE DISTINCTLY DIFFERENT FROM THIS CASE.

The Seventh Circuit could not find support for its ultimate holding in the text of Section 1981. It resorted to a House Committee Report, which was not passed by the bicameral legislature nor signed by the President. To try to support its holding, the Seventh Circuit erroneously relied on two cases from this Court: (1) *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969); and (2) *Jackson v. Birmingham Board of Education*, 544 U.S. 167 (2005). *See* JA 126-128, 138-144. Neither *Sullivan* nor *Jackson* addressed Section 1981, and thus the Court's analysis in each is not determinative of this case. Additionally, neither case presented a similar statutory conflict to that in

---

[5] It is disingenuous for any lawyer or jurist to include language in a statute or contract that was proposed and/or discussed, but was not ultimately included in the statute or contract.

this case in which a general statute (*i.e.*, Section 1981) is being used by lower courts to eviscerate a specific statute (*i.e.*, Title VII).

A. *Sullivan v. Little Hunting Park, Inc.* Does Not Address Section 1981, And The Court's Statutory Analysis Is Not Applicable To This Case.

In *Sullivan*, 396 U.S. at 234, the plaintiff, a white homeowner, sued a non-profit corporation created to operate a community park. The homeowner had a transferable membership interest in the corporation, entitling him to use the park. *Id.* He attempted to transfer his membership interest to an African-American homeowner, which, pursuant to the corporation's bylaws, required approval from its board of directors. *Id.* at 234-35. The board of directors refused to approve the transfer. *Id.* at 235. When the white homeowner protested, he was expelled from the corporation by the board of directors. *Id.* This Court ultimately addressed the issue of whether the white homeowner had standing to sue under 42 U.S.C. § 1982 (hereinafter "Section 1982") after being expelled from the corporation for advocating in favor of an African-American's rights. *Id.* at 237. Section 1982 protects all citizens' equal right "to inherit, purchase, lease, sell, hold, and convey real and personal property." 42 U.S.C. § 1982 (2006). Despite a lack of textual support, the Court found that the homeowner did have standing because absent his ability to sue, individuals would perpetuate "racial restrictions on property." *Sullivan*, 396 U.S. at 237. While not using the word "retaliate," this decision effectively created a

cause of action based on retaliation under Section 1982.

Sullivan must be viewed in light of the circumstances surrounding it. *See Jackson*, 544 U.S. at 176. When the Court decided *Sullivan* in 1969, the Court was engaging in a "freewheeling 'interpretation'" of statutory language and operating under the presumption that "judges [could] supplement statutes to make them 'more effective.'" JA 163-164 (Easterbrook, J., dissenting). As noted in Section II(B) above, beginning in 1975 with *Cort v. Ash*, 422 U.S. 66, and continuing with cases such as *Rodriguez v. United States*, 480 U.S. 522, in 1987, and many since then, the Court has changed its analytical framework and endorsed a system whereby courts "lash interpretations more closely to the statutory text." JA 163 (Easterbrook, J., dissenting). *See, e.g., Domino's Pizza*, 546 U.S. 470; *Lamie*, 540 U.S. 526; *Bedroc Limited*, 541 U.S. 176.

Congress' knowledge of this analytical change leads to the conclusion that if it was concerned about an anti-retaliation clause in Section 1981 when it amended it in 1991, Congress would have included such a clause so as to allow the courts to enforce one. *See supra* Section II (B). But, it did not.

Furthermore, unlike the case at bar, the Court in *Sullivan* did not have to address two overlapping statutes needing to be reconciled. *See supra* Section II(C). In *Sullivan*, the Court addressed 42 U.S.C. § 1982, which protects the right to freely "inherit, purchase, lease, sell, hold, and convey" property. Section 1982 does not enable an individual to ignore

otherwise applicable limitation periods in other statutes. As noted above, Section 1981, as erroneously interpreted by the Seventh Circuit, would permit such contravention of congressional mandates. *See supra* Section II(C).

Whereas the Court in *Sullivan* was not concerned with this predicament, the Seventh Circuit should have been. *See Morton v. Mancari*, 417 U.S. at 551 ("When there are two acts upon the same subject, the rule is to give effect to both if possible.") (citing *United States v. Borden Co.*, 308 U.S. 188, 198 (1939)). But, the Seventh Circuit ignored its responsibilities and stated that it is not the role of the Court "to attempt to harmonize these statutes." JA 145 (referring to Section 1981 and Title VII). Simply put, the Seventh Circuit erred in its analysis of this case and should not have relied on *Sullivan* as it did.

The Seventh Circuit improperly applied *Sullivan* in reaching its conclusion in this case, and this Court should reverse its findings.

B. *Jackson v. Birmingham Board Of Education* Does Not Address Section 1981, And The Court's Statutory Analysis Is Not Applicable To This Case.

In *Jackson*, 544 U.S. at 171, a public school teacher sued the Birmingham Board of Education, alleging that it violated 20 U.S.C. § 1681 *et seq.*, otherwise known as Title IX, by retaliating against him after he complained about sex discrimination in his school's athletic programs. Despite a lack of textual support, a majority of the Court held that Title IX's private

right of action encompasses claims for retaliation against an individual who complains about sex discrimination. *Id.* The Court relied, at least in part, on the fact that the word "discrimination" was sufficiently ambiguous to permit a reading of Title IX that included an anti-retaliation norm. *Jackson*, 544 U.S. at 173-74.

Like with *Sullivan*, however, the Court cannot ignore context. Title IX was enacted in 1972 when the Court was engaging in the "freewheeling interpretation" of statutory language noted above. *Jackson*, 544 U.S. at 176. The Court, in *Jackson*, stated that this timing provides "a valuable context for understanding [Title IX]." *Id.* Given that *Sullivan* is an example of the attitude of the Supreme Court just three years prior to the enactment of Title IX, it is reasonable to believe that Congress was aware of this when it enacted Title IX and would have expected Title IX to be interpreted in a substantially similar fashion. *Id.* at 176-77.

The same is not the case with respect to Section 1981 when it was amended in 1991. The Court's methodology for statutory analysis in 1991 was substantially different from that of the Court in 1972 when Congress enacted Title IX. In 1991, the Court had abandoned the approach that it took in cases such as *Sullivan*. The Court had begun "lash[ing] [statutory] interpretations more closely to the statutory text." JA 163 (Easterbrook, J., dissenting). *See also supra* Section II(B).

Also, as noted above concerning *Sullivan*, the Court in *Jackson* did not have to worry about potentially

eviscerating the comprehensive administrative and procedural schemes of a statue like Title VII. In *Jackson*, the Court only addressed Title IX, which protects against sex discrimination by recipients of federal education funding, and which does not overlap Title VII. *Jackson*, 544 U.S. at 173. Accordingly, just like in *Sullivan*, *Jackson* is inapplicable to the case at bar. The Court simply cannot ignore, as the Seventh Circuit did, its responsibility to reconcile Section 1981 and Title VII in this case. *See Morton*, 417 U.S. at 551. *See also supra* Section II (C).

The Court in *Jackson* additionally relied, at least in part, on the fact that the word "discrimination" in Title IX was sufficiently ambiguous to permit a reading of Title IX that included an anti-retaliation norm. *Jackson*, 544 U.S. at 173-74. Congress, however, did not use the term "discriminate" or "discrimination" anywhere in the text of Section 1981. Therefore, the Court's resolution of the ambiguity in the term "discrimination" does not apply to the case at bar.

There is one other crucial distinction in *Jackson*, namely that teachers and coaches were likely to be in the best situation to complain about discriminatory situations under Title IX. The Court reasoned that if they did not have an anti-retaliation provision to protect them, then the mandates of Title IX might not be achieved. *Jackson*, 544 U.S. at 181 ("sometimes adult employees are 'the only effective adversar[ies]' of discrimination in schools"). In the context of Section 1981 and employment, however, that is not the case. Complaining individuals like Respondent are already protected under Title VII. *See supra* Section II (C).

Accordingly, this Court's decision in *Jackson* is not applicable to the case at bar and the Seventh Circuit erred in using *Jackson* to buttress its conclusion.

V. PUBLIC POLICY DEMANDS THAT THIS COURT REVERSE THE SEVENTH CIRCUIT'S DECISION IN THIS CASE.

To read Section 1981 as the Seventh Circuit does creates a myriad of problems beyond its infidelity to the statutory text, principles of statutory construction, and case law described above.

First, the Seventh Circuit's decision dilutes Title VII and the importance of the EEOC. Since 1997, the EEOC has successfully conciliated over 4,000 disputes stemming from race-based charges. EEOC Charge Statistics, http://www.eeoc.gov/stats/race.html (last viewed Nov. 13, 2007). Approximately 25,000 more claims were resolved in other cooperative fashions. *Id.* Furthermore, over the past ten years, the number of charges alleging retaliation in violation of Title VII rose by nearly twenty percent. *See* EEOC Charge Statistics, http://www.eeoc.gov/stats/charges.html (last viewed Nov. 13, 2007) (noting an increase in retaliation charges before the EEOC from 16,394 in 1997 to 19,560 in 2006). This demonstrates that employees understand that their remedy for retaliation claims in the workplace is through Title VII and the EEOC. If a cause of action for retaliation is deemed cognizable under Section 1981, there is no telling how many cases that could be successfully resolved by the EEOC through the mechanisms created by Congress in Title VII will instead end up clogging the judicial system.

Second, if more cases are brought before the courts instead of the EEOC, both employers and employees will be harmed. They will be deprived of the congressionally-mandated opportunity to settle claims without the added cost of litigation. *See Ledbetter*, 127 S. Ct. at 2170-71 (noting the importance of conciliation and cooperation in the resolution of employment disputes before the EEOC). Where the EEOC does not have the opportunity to conciliate employment disputes, employers can suffer greater harm to their public reputation, and they can potentially become liable for the employee's attorneys' fees at trial. *See* 42 U.S.C. § 2000e-5(k).

Third, the burden on the courts may be significant, and the courts will be forced to devote more of their limited resources to resolving disputes and discovery issues that should otherwise proceed through the EEOC. *See United States v. Dieter*, 429 U.S. 6, 8 (1976) (noting that the Court must be "wary of imposing added and unnecessary burdens on the courts of appeals"); *Emerald Investors Trust v. Gaunt Parsippany Partners*, 492 F.3d 192, 204 (3d Cir. 2007) (noting the "burdens on the federal courts" caused by the "massive increase in the quantity of litigation in the federal courts for the last 30 years, far outpacing the growth in the size of the federal judiciary").

Fourth, the Seventh Circuit's decision results in a super-protected class created by the judiciary, not Congress. If this Court affirms the Seventh Circuit's decision, race/color will receive paramount protection in the employment context, protection beyond that level of protection afforded other protected classifications (*e.g.*, gender). Title VII created specific

statutes of limitations with which Respondent in this case did not abide. JA 91-92. However, because Respondent's claim involves alleged retaliation stemming from his alleged complaint about *racial* discrimination, the Seventh Circuit has held that he can still file a lawsuit against his former employer under Section 1981 up to four years after the alleged incident of retaliation. JA 136; *see Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 372 (2004) (noting that 28 U.S.C. § 1658 creates a four-year statute of limitations for Section 1981). If a woman, on the other hand, is retaliated against for complaining about gender discrimination, she is relegated to the protections afforded her under Title VII alone. She, unlike Respondent, would have to file a charge before the EEOC within 180 days of the alleged retaliation. She, unlike Respondent, would also have to file a lawsuit within 90 days of receiving a right to sue letter from the EEOC.

Title VII was enacted to break the "glass ceiling" in our society that impeded certain groups in the workforce from succeeding. Congress, however, decided that all individuals protected under Title VII had to abide by Title VII's relatively short statutes of limitations for employment-related discrimination or retaliation. *See generally Ledbetter*, 127 S. Ct. 2162. Nonetheless, the Seventh Circuit now holds that those requirements do not apply if an individual's claim is somehow related to the color of his/her skin. This defies any normal reading of Section 1981 and Title VII, along with general principles of equality.

Finally, as argued throughout, this Court should not affirm the Seventh Circuit's disregard for

democratic norms. As Justice Scalia noted in 1999, the most important legal development in the past thousand years is "the principle that laws should be made not by a ruler, or his ministers, or his appointed judges, but by representatives of the people." Antonin Scalia, Editorial, *How Democracy Swept the World*, WALL ST. J., Sept. 7, 1999, at A24. The federal courts are staffed with many outstanding judges and justices. Not one of those judges or justices has been elected by the people. *See* U.S. CONST. ART. II, § 2. Nonetheless, as delineated above, the Seventh Circuit and other lower courts have acted as if they were elected by the people, independently creating a cause of action based on retaliation under Section 1981 out of whole cloth. *See* JA 136; *Hawkins*, 163 F.3d 684; *Andrews*, 140 F.3d 1405; *Thomas*, 943 F. Supp. 751; *Adams*, 865 F. Supp. 445. These courts have independently created a cause of action under Section 1981 where the people's representatives (*i.e.*, Congress) specifically chose not to. This represents a reversion to the days when judges whimsically created laws at their pleasure. This contravenes the Constitution and the separation of powers. This disregard for our chosen system of government cannot be upheld by this Court.

Accordingly, this Court should reverse the Seventh Circuit because its decision creates a myriad of practical and systemic problems in violation of public policy.

CONCLUSION

The judgment of the Seventh Circuit Court of Appeals should be reversed because: (1) the plain language of Section 1981 does not provide for a cause

of action based on retaliation; (2) proper application of statutory construction shows that Congress intended to exclude a cause of action based on retaliation from Section 1981; (3) the Seventh Circuit misused a portion of the legislative history to create a cause of action under Section 1981 where none exists in the text of the statute; (4) the Seventh Circuit erroneously relied on this Court's decisions in *Sullivan* and *Jackson* to support its opinion; and (5) public policy demands such a result. If this Court does not reverse the Seventh Circuit and hold that Section 1981 does not provide for a cause of action based on retaliation, any judge will be free to substitute his/her pleasure for the express intentions of Congress whenever the judge personally wishes the statute had been drafted differently or disagrees with how it was drafted by Congress.

Respectfully submitted,

MICHAEL W. HAWKINS
Counsel of Record
MICHAEL J. NEWMAN
DINSMORE & SHOHL LLP
Suite 1900
255 East Fifth Street
Cincinnati, Ohio 45202
(513) 977-8270
(513) 977-8141 fax
michael.hawkins@dinslaw.com
michael.newman@dinslaw.com

MICHAEL ZYLSTRA
General Counsel and Vice President
CBOCS, West, Inc.
307 Hartmann Drive
P.O. Box 787
Lebanon, Tennessee 37088
(615) 235-4006
(615) 443-9583 fax
michael.zylstra@crackerbarrel.com

Counsel for Petitioner CBOCS West, Inc.

Date: November 14, 2007